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**Why the Reserved Water Rights Compact between the State of Montana  
and the USDA Forest Service needs amending**

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- The compact details **for perpetuity** what the legal nature of water right claims will be for **the largest landowner in the state of Montana**. Because of the finality of the document, it must be done right. And this is why when considering this Compact, it is critical to avoid thinking in terms of the State needing to get the better of the federal government, and instead think of how the two sovereigns can work in consort for the benefit of current and future Montana citizens.
- Because both parties spent most of their negotiating effort in an adversarial relationship, the compact negotiators missed an opportunity to capitalize on critical interests the State of Montana and the USDA Forest Service hold in common. For example:
  - **When the Forest Service has a state-recognized water right for protecting streamflows on its lands it is good for Montana** because it means downstream, off-forest water users such as irrigators and cities have increased legal certainty that dependable flows of water will continue coming off public lands to meet their existing needs;
  - **When the Forest Service has an instream water right upstream of existing users with rights, it is good for Montana because it means the federal government can legally help protect senior water right holders** from new, diversionary appropriations that could be harmful;
  - **When the Forest Service has instream flow rights it is good for Montana because it means the federal government can help the State of Montana meet its trust responsibilities** to protect fish, wildlife and water quality for Montana citizens.
- Despite nearly 15 years of negotiations, the State would only agree to allow the Forest Service to have instream flow rights on a mere 77 streams, primarily small headwater streams, primarily in western Montana and with most facing limited future risk of water development. That is, they could reach agreement on only 77 streams of the thousands of possible streams or stream reaches available. The

primary criterion for the 77 streams being in this compact was technical -- flow data is available for them that meet narrow standards set out by the State for the Compact. The relative value of specific streams to the importance Montanans place in ensuring these streams deliver water -- be it for recreation, fish or downstream irrigators and domestic users -- was only considered for a few streams.

- Among the streams not deemed suitable by the State for an instream flow right for the Forest Service at this time were tributaries of rivers that the State itself has instream flow water rights for -- water rights that already are not being fulfilled because of older, valid competing uses. This includes key tributaries of famous fisheries such as the Gallatin River, Big Hole River and Blackfoot River. It is important to note that in each one of these basins, and most others, there currently are more water right claims than available water. But the Compact implies that in each one of these basins, and others, that water is indeed available in tributaries for future appropriation and diversion upstream of existing users who already don't get enough water to meet their claims.
- The Compact does include a limited instream flow right for the Forest Service for some important streams, most notably Rock Creek, near Clinton, and tributaries of the Swan River, whose flows could be threatened by thirsty subdivision development on intermingled Plum Creek tracts.
- The Compact does allow the Forest Service to apply for additional instream flow rights in the future -- and that's good -- but the process the Compact establishes to accommodate this is hamstrung by language that heavily favors a flow measurement technique for new instream flow claims that can be costly and time-intensive to perform. This will result in the Forest Service, even with the State's help, from applying for many more instream flow claims. Further, the technique prescribed in the Compact, the "wetted-perimeter" technique is rapidly becoming outdated as the best way to determine what flows are beneficial for fish and other aquatic life, the primary beneficial use the Compact alleges to protect.
- Recognizing that 15 years of negotiation have occurred, and that there are some good things in the Compact, Trout Unlimited recommends the accord be amended, not radically, and only in a couple of key areas. Proposed amendments are attached that:
  - Amend Article VI. to allow for alternative flow measurement techniques to be given equal deference with the "wetted perimeter" method, as long as have been peer reviewed by the scientific community. The Compact now says alternative methods can be used but only after the State initiates a public rule making -- which to us seems like an unnecessarily time-consuming and expensive process to go through. Instead, let the Forest Service or State recommend a new technique and negotiate its use. The goal is to make it less expensive and easier to

implement and come to agreement on new requests for instream flow claims on national forests; and

- Amend Article VIII. to require the State to negotiate a side agreement with the Forest Service, perhaps by January 1, 2008 or perhaps by the beginning of the 2009 Legislature that includes a roadmap on how, when and where the Forest Service expects to make future claims for an instream flow right. This provides additional certainty for the public that the process created in the Compact will be used, and it provides for accountability that the Forest Service and State have been diligent in finding final resolution on all future claims.

These are small requests for amendments that can materially make the Compact better serve the interests of all Montanans.

Finally, each year hundreds of thousands of people visit national forests in Montana. Many, if not most, go to enjoy streams, lakes and rivers. Each spring and summer thousands of irrigators turn on headgates from stream reaches on private lands in places that sit below national forests and which are fed by water that collects from the high country of national forests. These places are in the Gallatin, Big Hole, Madison, Yellowstone Valleys. You'd be hard pressed today to find more than a few dozen people among them all who could explain what this Compact does, if they have even heard of it.